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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1281

HERMAN FRANKS,

Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	6
CONCLUSION	7

APPENDIX

Judgment and Commitment, United States District Court for the Western District of Tennessee, Criminal Number 72-48	1a
Judgment and Commitment, United States District Court for the Western District of Tennessee, Criminal Number 72-49	3a
Opinion of The United States Court of Appeals for the Sixth Circuit	5a

TABLE OF CASES

Barton v. *United States*, (C.A. 5, 1959) 263 F.(2d) 894	6
Bruton v. *United States*, (1968) 391 U.S. 123	6, 7
Holmes v. *Burr*, (C.A. 9, 1973) 486 F.(2d) 55, 60	6
Jackson v. *Denno*, (1936) 378 U.S. 368	6
Katz v. *United States*, (1967) 389 U.S. 347	6
United States v. *Emmons*, (1973) 410 U.S. 396	7
United States v. *Goss*, (C.A. 4, 1964) 329 F.(2d) 180	6

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No. ----------

HERMAN FRANKS,

Petitioner,

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and decision of the United States Court of Appeals for the Sixth Circuit decided and filed on February 12, 1975. No petition for rehearing was filed.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was filed February 12, 1975. A copy of said decision is attached hereto and made a part of this petition of writ of certiorari.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1), and pursuant to Rule 19 1(b) of the Revised Rules of The Supreme Court of the United States adopted June 15, 1970.

QUESTIONS PRESENTED

1. Whether the petitioner's rights under the Fourth Amendment to the Constitution of the United States were violated by the action of the Court of Appeals in affirming the action of the trial court in admitting into evidence tape recordings of petitioner's telephone and face-to-face conversations with a Government informer, recorded without a warrant or judicial sanction, and without petitioner's knowledge or consent.

2. Whether the petitioner's rights under the Fifth Amendment to the Constitution of the United States, to due process of law, were violated by the action of the Court of Appeals in affirming the action of the trial court in (a) refusing to grant petitioner Franks a separate trial from co-defendant Mitchell, who had conspired to kill a Government witness, which the Government was allowed to prove at the joint trial of Franks and Mitchell, when Franks had no connection with the conspiracy to kill the witness; and (b) in admitting into evidence fraudulent documents, deliberately falsified and prepared by the Government, which contained admittedly false statements that appellant Franks had been involved in another bombing, not involved in this indictment, which false documents were read to the jury.

3. Did the Court of Appeals err in holding that the Hobbs Act, 18 U.S.C., Section 1951, was violated by violence designed to coerce a business man into changing his establishment from non-union to union?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of the United States, Amendment 4:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ."

2. Constitution of the United States, Amendment 5:

"No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

3. 18 U.S.C.A., Section 1951. Interference with Commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section –

• • •

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

STATEMENT OF THE CASE

On March 13, 1972, defendant-petitioner Herman Franks and three others were indicted, in the United States District Court for the Western District of Tennessee, for aiding, abetting, inducing and procuring Jay Rollins and Floyd Carter Jerkins to bomb the Jett Hair Care Center and the Tri-State Beauty Supply building in Memphis, Tennessee, on June 2, 1971, in violation of Title 18, United States Code, Section 844(i), and Title 18, United States Code, Section 2.

A separate indictment was returned on the same date, charging defendant-petitioner Franks and two others with having unlawfully caused others to bomb the Jett Hair Care Center and the Tri-State Beauty Supply for the purpose of obstructing commerce, in violation of Title 18, United States Code, Section 1951 and Section 2.

The defendants, Franks, Max Britton and Boyce Mitchell, pleaded not guilty. Defendants, Jay Rollins, Floyd Carter Jerkins and J. B. Webster, plead guilty.

On March 30, 1972, defendant-petitioner Franks filed a motion for severance referring to an indictment of co-defendant Boyce Mitchell in another proceeding for conspiring to kill a Government witness in this bombing case. On February 22, 1973, the trial court entered an order overruling this motion. During the trial, objection was made by one of the attorneys for defendants to introduction of the evidence that Mitchell had conspired to kill one of the Government witnesses in the case, but this objection was overruled and proof of Mitchell's conspiracy to kill the witness was admitted into evidence. Franks had nothing to do with this conspiracy.

During the trial, the Government introduced in evidence false documents which had admittedly been deliberately prepared by Government agents, in collaboration with the United States Attorney's Office, having the appearance of official Government correspondence, which falsely stated that one

of the defendants had implicated petitioner-defendant Franks in another bombing that is not the subject of this indictment, in McMinnville, Tennessee. The Court admitted these documents into evidence over defendant's objections.

At the trial the trial court admitted into evidence tape recordings of Franks' telephone conversations, and face-to-face conversations, with a Government informer, recorded by the informer without a warrant or judicial sanction, and without defendant's knowledge or consent. Defendant objected to introduction of such recordings. Defendant's pre-trial motion to suppress such recordings, and his objection to the introduction of such recordings into evidence, were overruled by the trial judge.

At the conclusion of the jury trial, Franks, Britton and Mitchell were convicted under both indictments. Franks was sentenced to ten years under each indictment, the sentences to run concurrently.

Franks perfected his appeal to the United States Court of Appeals for the Sixth Circuit, which affirmed Franks' conviction by its opinion filed herein on February 12, 1975.

Petitioner Franks is here complaining of the action of the Court of Appeals for the Sixth Circuit in admitting the tape recordings, recorded without a warrant or judicial sanction, into evidence at the trial; in refusing to grant Franks a severance from co-defendant Mitchell who had attempted to kill a Government witness; in affirming the action of the trial court in admitting into evidence false documents prepared by the Government which falsely stated that Franks had been involved in an unlawful bombing not involved in the indictments in this cause; and in holding that violence designed to compel a non-union employer to change his establishments to union constituted extortion within the meaning of the Hobbs Act.

ARGUMENT

1. We respectfully contend that the admission into evidence of tape recordings of Franks' telephone and face-to-face conversations with a paid Government informer, recorded by the informer without the knowledge or consent of Franks, without judicial authorization, and without a search warrant, violated Franks' rights under the Fourth Amendment.

Katz v. *U. S.*, (1967)
389 U.S. 347

Holmes v. *Burr*, (C.A. 9, 1973)
486 F.(2d) 55, 60
(Dissenting opinion)

"(p. 73) After mistaken notions of consent are corrected and the rubble of fictions is removed from electronic surveillance, participant monitoring is revealed to be squarely within the rule of *Katz* . . ."

2. Franks' rights to a fair trial, guaranteed him by the Fifth Amendment to the Constitution, were violated by the action of the Court of Appeals in affirming the action of the trial judge in:

(a) Refusing to grant Franks a severance from co-defendant Mitchell, who was under separate indictment for conspiring to kill a Government witness in this case, and permitting the Government to prove such conspiracy, with which Franks had no connection, at the trial of this case.

Jackson v. *Denno*, (1936)
378 U.S. 368

Barton v. *United States*, (C.A. 5, 1959)
263 F.(2d) 894

United States v. *Goss*, (C.A. 4, 1964)
329 F.(2d) 180

Bruton v. *United States*, (1968)
391 U.S. 123

(b) Admitting into evidence fraudulent documents, deliberately falsified and prepared by the Government, which contained admittedly false statements that appellant Franks had participated in another bombing of a barber shop, not involved in this indictment.

There is no way to know whether the trial court's cautionary charge could erase this false evidence from the minds of the jury. This seems particularly doubtful when the prestige of the United States Attorney's Office was used to authenticate these false documents.

Bruton v. *United States,* (1968)
391 U.S. 123

3. The Court of Appeals erred in holding that the Hobbs Act, 18 U.S.C., Section 1951, proscribes activity undertaken in pursuit of a legitimate union goal – the unionization of non-union barber shops.

United States v. *Emmons,* (1973)
410 U.S. 396.

CONCLUSION

For the foregoing reasons, we respectfutlly submit that a writ of certiorari should issue to the United States Court of Appeals for the Sixth Circuit, and that the Court's decision affirming the actions of the trial court should be reversed.

Respectfully submitted,

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ERICH W. MERRILL

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Memphis, Tennessee 38103

APPENDIX

JUDGMENT AND COMMITMENT

(Filed June 15, 1973)

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. CR-72-48

UNITED STATES OF AMERICA

v.

HERMAN FRANKS

On this 15th day of June, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Robert W. Andrews, Esquire.

IT IS ADJUDGED that the defendant upon his plea of not guilty as found by the jury on April 6, 1973 has been convicted of the offense of aided, abetted, counseled, commanded, induced and procured other defendants to maliciously damage and attempted to destroy by means of an explosive a building, the business of which involved activity in and affecting interstate commerce, in violation of Title 18, USC, Section 844(i) and Title 18, USC, Section 2 as more fully set out in Count 1; and a similar offense in Court 2 as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN YEARS on each of Counts 1 and 2 to run concurrently with each other and to run concurrently with the ten year sentence this day imposed in CR-72-49 making a total period of imprisonment of TEN YEARS. The defendant is allowed to stand on his present bond pending appeal, if an appeal be taken.

APPROVED:

/s/ W. H. EWING, JR.
Assistant U.S. Attorney

SEAL

Certified True Copy

W. LLOYD JOHNSON, Clerk
By /s/ D. SHORT
Deputy Clerk

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BAILEY BROWN,
Chief United States District Judge.

The Court recommends commitment to:

....., Clerk.

JUDGMENT AND COMMITMENT

(Filed June 15, 1973)

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. CR-72-49

UNITED STATES OF AMERICA

v.

HERMAN FRANKS

On this 15th day of June, 1973 came the attorney for the government and the defendant appeared in person and with counsel, Robert W. Andrews, Esquire.

IT IS ADJUDGED that the defendant upon his plea of not guilty is guilty as found by the jury on April 6, 1973 has been convicted of the offense of unlawfully did cause cause others to commit physical violence to Jett Hair Care Center and Tri-State Beauty Supply, business establishments, the operation of which affected commerce, in furtherance of a plan and purpose to obstruct commerce, in violation of Title 18, USC, Section 1951 and Title 18, USC, Section 2 as set out in the one count indictment, as charged in the indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN YEARS to run concurrently with the ten year sentence this day imposed in CR-72-48, making a total period of imprisonment of TEN YEARS. The defendant is allowed to stand on his present bond pending appeal, if an appeal be taken.

APPROVED:

/s/ W. H. EWING, JR.
Assistant U. S. Attorney

SEAL

Certified True Copy

W. LLOYD JOHNSON, Clerk
By /s/ D. SHORT
Deputy Clerk

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ BAILEY BROWN,
Chief United States District Judge.

The Court recommends commitment to:

....., Clerk.

Nos. 73-2157, 73-2158, 73-2159, 73-2160
and 74-1138

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HERMAN FRANKS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MAX BRITTON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
HERMAN FRANKS,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MAX BRITTON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BOYCE MITCHELL,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed February 12, 1975.

Before: PECK, LIVELY and ENGEL, Circuit Judges.

PECK, Circuit Judge. Defendants-appellants Franks and Britton were convicted, after a sixteen-day (16-day) jury trial in district court, of causing others on or about June 2, 1971, to commit physical violence to Jett Hair Center ("Jett Hair") and Tri-State Beauty Supply ("Tri-State"), two Memphis, Tennessee, businesses whose operation affected commerce, in furtherance of a plan and purpose to obstruct commerce in violation of the Hobbs Act, 18 U.S.C. § 1951(a) (1970),[1] and of 18 U.S.C. § 2 (1970).[2] Franks and Britton also were convicted of aiding and abetting the malicious damaging and attempt to destroy on or about June 2, 1971, by means of an explosive, Jett Hair and Tri-State in violation of 18 U.S.C. § 844(i) (1970)[3] and of 18 U.S.C. § 2 (1970). Defendant-appellant Mitchell, tried together with Franks and Britton, was convicted of knowingly causing on or about June 1, 1971, certain explosives (blasting caps) to be transported in interstate commerce without being licensed to do in violation of 18 U.S.C. § 842(a)(3)(A) (1970)[4]

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1 "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

2 "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

3 "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both . . . ."

4 "It shall be unlawful for any person . . . other than a licensee or permittee knowingly . . . to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials, except that a person who lawfully purchases explosive

Together, appellants have asserted no fewer than twenty-five claims on appeal. We have found, however, no reversible error.

Franks, Britton and Mitchell claim that they were misjoined in the indictments and that, in any event, the district judge should have granted their pre-trial motions for separate trials. Franks and Britton add that the district court erred in consolidating the purported Hobbs Act violation, charged in a separate indictment, with the indictment charging them and Mitchell with explosives violations. Counts 1 and 2 of Indictment 72-48 charged Franks and Britton with aiding and abetting, on or about June 2, 1971, the malicious damaging and attempt to destroy by explosives Jett Hair and Tri-State. Count 3 of Indictment 72-48 charged Mitchell with causing on or about June 1, 1971, the interstate transportation of blasting caps from Mississippi to Tennessee. Indictment 72-49 charged Franks and Britton with, on or about June 2, 1971, causing others to commit physical violence to Jett Hair and Tri-State in violation of the Hobbs Act.

Because more than one defendant is involved, Federal Rule of Criminal Procedure 8(b) governs the permissibility of joinder. *United States* v. *Bova*, 493 F.2d 33, 35 (5th Cir. 1974); *Cupo* v. *United States*, 359 F.2d 990, 992 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1013 (1967). Rule 8(b) permits the joining in an indictment of defendants "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Of course, Rule 8(b) can, and should, be "broadly construed in favor of initial joinder," because of the protection Rule 14 affords against unnecessarily prejudicial joinder. *United States* v. *Isaacs*, 493 F.2d 1124, 1158 (7th Cir.), *cert. denied*,

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materials from a licensee in a State contiguous to the State in which the purchaser resides may ship, transport, or cause to be transported such explosive materials to the State in which he resides and may receive such explosive materials in the State in which he resides, if such transportation, shipment, or receipt is permitted by the law of the State in which he resides . . . ."

417 U.S. 976 (1974); *United States* v. *Friedman*, 445 F.2d 1076, 1082-1083 (9th Cir.), *cert. denied sub nom., Jacobs* v. *United States*, 404 U.S. 958 (1971); *Haggard* v. *United States*, 369 F.2d 968, 973 (8th Cir. 1966), *cert. denied*, 386 U.S. 1023 (1967). As other courts have recognized,

> "In determining whether offenses are based on 'acts or transactions connected together,' the predominant consideration is whether joinder would serve the goals of trial economy and convenience; the primary purpose of this kind of joinder is to insure that a given transaction need only be proved once." *Baker* v. *United States*, 401 F.2d 958, 971 (D.C. Cir. 1968).

Accord, *Cataneo* v. *United States*, 167 F.2d 820, 823 (4th Cir. 1948).

Had Indictment 72-48 explicitly alleged that the blasting caps which Mitchell allegedly caused to be transported were intended to be used, or even used, in the Memphis explosions, it could hardly be urged that they were not the "same transactions." See *United States* v. *Morgan*, 394 F.2d 973 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968) (joinder of defendant charged with receiving and concealing stolen government bonds with defendants charged with "some aspects of the theft, transportation or sale of the bonds"); *United States* v. *Bryant*, 490 F.2d 1372 (5th Cir.), *cert. denied sub nom., Impson* v. *United States*, 95 S.Ct. 57 (1974) (joinder of defendant charged with transporting and receiving stolen automobile with defendant charged with receiving such automobile); *Kitchell* v. *United States*, 354 F.2d 715 (1st Cir.), *cert. denied*, 384 U.S. 1011 (1966) (joinder of defendants charged with transporting stolen cigarettes with defendant charged with receipt of such cigarettes); *Caringella* v. *United States*, 78 F.2d 563 (7th Cir. 1935) (joinder of defendants charged with theft with defendant charged with receiving and possessing stolen goods). Though explicitly alleging the connection is preferred practice, Orfield, Joinder in Federal Criminal Procedure, 26 F.R.D. 23,

72-73 (1960), the lack of such an allegation is immaterial where, as here, a connection sufficient for proper joinder is implicit. See *United States* v. *Bally Mfg. Co.*, 345 F. Supp. 410, 430 (E.D. La. 1972) (finding "participat[ion] in a series of acts" from "a fair reading" of the indictment); *United States* v. *Florida*, 315 F.Supp. 795, 797 (E.D.N.Y. 1970) ("participation" found "in light of" allegations); *United States* v. *Welsh*, 15 F.R.D. 189, 190 (D.D.C. 1954) (indictment "deemed" or "construed" as alleging "same series of acts or transactions"). See also *United States* v. *Lugo*, 269 F. Supp. 757 (E.D. Wis. 1967) (indictment "not susceptible to a reasonable construction" of connected transaction). The alleged interstate transportation predated the explosions by one day, and the alleged transportation was to Tennessee where the explosions occurred. Even if the absence of such explicit allegation invalidated the joinder, the later development of a "connection" sufficient for Rule 8(b) would permit the district court to consolidate separate indictments, and presumably separated counts, for trial. See *King* v. *United States*, 355 F.2d 700, 703 (1st Cir. 1966); *Griffin* v. *United States*, 272 F.2d 801 (5th Cir. 1959), *modified*, 273 F.2d 958 (5th Cir. 1960); *United States* v. *Florio*, 315 F. Supp. 795, 797 (E.D.N.Y. 1970); *United States* v. *Havrick*, 153 F. Supp. 696, 698 (D.N.D. 1957).

If Counts 1, 2 and 3 were properly joined in Indictment 72-48, then the charges contained in Indictment 72-49, stemming from the same explosions as the charges contained in Courts 1 and 2 of Indictment 72-48, were properly tried together with the charges contained in Indictment 72-48 because they, being virtually identical to the charges of Counts 1 and 2 of Indictment 72-48, "could have been joined in a single indictment" with the charges of Indictment 72-48. Fed. R. Crim. P. 13.

Even if Franks, Britton and Mitchell were joined contrary to Rule 8(b), such misjoinder most likely would be harmless error because evidence of the explosions would be admissible

against Mitchell in establishing his knowledge that the transportation of the blasting caps would be interstate and because evidence of the interstate transportation of the blasting caps would be admissible against Franks and Britton in establishing the plan or scheme of the bombings. *United States* v. *Weiss*, 491 F.2d 460, 466-467 (2d Cir.), *cert. denied*, 95 S.Ct. 58 (1974); *United States* v. *Roselli*, 432 F.2d 879, 901 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971); *Baker* v. *United States*, 401 F.2d 958, 972-73 (D.C. Cir. 1968).

Even assuming that the charges of the indictments were properly joined and that the indictments otherwise would be properly consolidated for trial, Rule 14 still authorizes a separate trial to avoid the undue prejudice of a joint trial. A district court's denial of a severance, however, is reversible only for an abuse of discretion. *United States* v. *Demetre*, 461 F.2d 971 (6th Cir. 1972); *United States* v. *Martinez*, 428 F.2d 86 (6th Cir.), *cert. denied*, 400 U.S. 881 (1970), 402 U.S. 951 (1971); *United States* v. *Morgan*, 394 F.2d 973 (6th Cir.), *cert. denied*, 393 U.S. 942 (1968).

Franks and Britton primarily claim undue prejudice in that the government was allowed to attempt to prove that Mitchell conspired to kill a government witness. We find, however, no prejudice in that a jury could be expected to segregate such evidence and apply it only to Mitchell. *United States* v. *Bell*, 457 F.2d 1231, 1240 (5th Cir. 1972). See *United States* v. *Gimelstob*, 475 F.2d 157, 160 (3rd Cir.), *cert. denied*, 414 U.S. 828 (1973); *In re Gottesman*, 332 F.2d 975 (2d Cir. 1964).

Mitchell's claim of prejudice in a joint trial is somewhat more substantial. He claims that because the statute he was convicted of is rather simple, requiring only that he (1) knowingly, (2) transported or caused to be transported explosive devices in interstate commerce, (3) without being licensed to do so, evidence that the blasting caps were used in illegal bombings and evidence of labor violence in Memphis was irrelevant to his charge and, hence, unnecessarily prejudicial. Though Mitchell's claim presents serious issues, we decline

to hold that the district court abused its discretion in refusing to grant Mitchell a separate trial because much of the evidence concerning the bombings and labor violence would be admissible, in any event, in a separate trial of Mitchell as tending to prove scienter. See *Robinson* v. *United States*, 459 F.2d 847, 854-860 (D.C. Cir. 1972); *Blunt* v. *United States*, 404 F.2d 1283, 1288 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 909 (1969). See generally *Manning* v. *Rose*, No. 74-1121 (6th Cir., filed Dec. 13, 1974). That Franks and Britton were more culpable than Mitchell, of course, does not require that Mitchell be tried separately. See *United States* v. *Demetre*, 461 F.2d 971, 974 (6th Cir. 1972); *United States* v. *Vida*, 370 F.2d 759, 765 (6th Cir. 1966), *cert. denied*, 387 U.S. 910 (1967).

Franks, Britton and Mitchell also argue that the district judge erred in admitting certain tape recordings of their conversations with certain government informants because the judicially unauthorized taping of such face-to-face and telephonic conversations violated either the Fourth Amendment or 18 U.S.C. § 2510 et seq. (1970).[5] The informants' consent to having such conversations recorded would shield those recordings from constitutional, *United States* v. *White*, 401 U.S. 745 (1971), *Stephen* v. *United States*, 496 F.2d 527 (6th Cir. 1974), *United States* v. *Black*, 472 F.2d 130 (6th Cir. 1972), *cert. denied*, 411 U.S. 969 (1973); *United States* v. *Martinez*, 428 F.2d 86, 88 (6th Cir.), *cert. denied*, 401 U.S. 881 (1970), 402 U.S. 951 (1971), and statutory, 18 U.S.C. § 2511 (c) (1970), *United States* v. *Johnson*, 484 F.2d 165, 168 (9th Cir.), *cert. denied*, 414 U.S. 1112 (1973), *United States* v. *Puchi*, 441 F.2d 697 (9th Cir.), *cert. denied*, 404 U.S. 853 (1971), *Bakes* v. *United States*, 350 F.

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[5] "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceedings in or before any court . . . if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (1970).

Supp. 547 (N.D. Ill. 1972), *aff'd*, 478 F.2d 1405 (7th Cir. 1973), *United States* v. *Riccobene*, 320 F.Supp. 196, 203 (E.D.) Pa. 1970), *aff'd*, 451 F.2d 586 (3rd Cir. 1971), attack. Mitchell, however, attacks the validity of informant Davis' consent, arguing that:

> "Davis had a long criminal record and had numerous charges pending against him. The Government placed him under full protective custody, gave him an extremely nice apartment for he [sic] and his girlfriend, provided him with a living allowance, secured for his use a new Cadillac automobile and gave him other special considerations. Additionally, Davis was never tried for or sentenced for any of the crimes of which he was charged prior to his agreement to cooperate with government." Michell's Brief 31.

We find, however, sufficient consent to shield the government recordings. See *United States* v. *Dowdy*, 479 F.2d 213, 229 (4th Cir.), *cert. denied*, 414 U.S. 823 (1973) (pressure of potential indictment and promise of immunity insufficient to vitiate consent); *United States* v. *Silva*, 449 F.2d 145 (1st Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (promise of suspended sentence in reference to pending indictment insufficient); *Black* v. *United States*, 341 F.2d 583 (9th Cir.), *cert. denied*, 382 U.S. 854 (1965) ("special employee" status of and promise to arrestee to make his co-operation "known" to prosecutor's office insufficient).

Franks and Britton claim their Hobbs Act convictions should be reversed because the government neither alleged nor proved extortion. The government counters that it need neither allege nor prove extortion if it alleges and proves physical violence affecting commerce. We can accept *in toto* neither interpretation of the Hobbs Act. The Hobbs Act, by the plainest of language, proscribes "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section." The statute makes clear that a plan or purpose "in violation of this section" in-

cludes a plan or purpose of "obstruct[ing], delay[ing], or affect[ing], commerce . . . by robbery or extortion . . . ." Thus, if one commits physical violence affecting commerce in furtherance of a plan of obstructing, delaying or affecting commerce "by robbery or extortion," he has violated the Hobbs Act. We reject the interpretation urged by Franks and Britton, an interpretation which would require extortion. We construe the statute as reaching physical violence designed to culminate in extortion, even if the scheme aborts prior to extortion. Likewise, we cannot accept the government's view that the statute proscribes all physical violence obstructing, delaying, or affecting commerce. The statute's language and legislative history[6] require that the violence be in furtherance of a plan or purpose to obstruct, delay, or affect commerce by extortion or robbery.

In applying the adopted interpretation, we find sufficient evidence underlying the jury finding that Franks and Britton violated the statute. Particularly in light of the Hobbs Act's legislative history,[7] violence designed to coerce a businessman into changing his establishments from non-union to union is certainly violence designed to extort.[8] Moreover, the indictment was hardly prejudicial or insufficient in that it alleged physical violence "in violation of Title 18, United States Code, § 844(i)," which, from a plain reading of the statute, would mean physical violence in furtherance of a plan or purpose of obstructing, delaying, or affecting commerce by robbery or extortion.

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[6] See 91 Cong. Rec. 11899-11922 (1945).

[7] The Hobbs Act was designed to prevent labor orginizations from coercing farmers to "hire" union drivers in order to get their produce to city markets. See 91 Cong. Rec. 11904, 11905, 11917 (1945).

[8] The district judge properly charged the jury that extortion means "to obtain the property of another, with consent of such other person, by inducing such consent by wrongful use of force, violence or fear." Trial Transcript at 3668. By coercing a businessman into changing his establishment from non-union to union, or risk being bombed, one deprives the businessman of his "property" interest of an economic advantage, of using non-union labor, or of operating his business.

Britton complains that the district judge erred in refusing eighteen requested jury instructions and in losing those requests. Fortunately, Britton and the government were able to reconstruct sixteen of the requests.[9] Of those sixteen, twelve were substantially covered, implicitly or explicitly, in the instructions given the jury; and four were inapplicable to the evidence. Although we can neither comprehend nor condone the loss of the requested instructions, it does not appear that such loss prejudiced Britton's substantial rights. The district judge's instructions fairly posed the jury issues, only two requested instructions remain missing, and Britton has made no claim that those missing requests differ substantially from the other sixteen which the district judge properly denied. We are unwilling to reverse in such circumstances. Compare *United States* v. *Perry*, 471 F.2d 1057 (D.C. Cir. 1972) (unexplained loss of one witness' grand jury testimony needed for Jencks Act compliance).

Mitchell and Britton claim that the court order compelling them to give voice exemplars violated their constitutional right against unreasonable searches and seizures and their constitutional privilege against self-incrimination. *United States* v. *Dionisio*, 410 U.S. 1 (1973), established that compelling voice-

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[9] "Counsel for the Defendant Max Britton, having informed the Court that the eighteen (18) Requests for Jury Instructions submitted on behalf of Defendant Max Britton, and denied by the Court as set out in the transcript at page 3687 and diligent search having been made in the file transmitted to the Sixth Circuit Court of Appeals, in the file of the United States District Court Clerk for the Western District of Tennessee, in the records and papers of the Court Reporter, and the file of the district judge, said Requests cannot be found, it is, on motion of the Defendant Max Britton, through counsel, and by consent of the United States District Attorney.

"It is ordered, that the attached copies of sixteen (16) of the Requests for Jury Instruction submitted by Defendant Max Britton are authentic copies of those denied by the Court and properly excepted to by said Defendant. The Clerk is ordered to make said copies a part of the record in this cause and transmit them to the United States Court of Appeals for the Sixth Circuit at Cincinnati to be included in the record of the cause.

"Because of the inability to reconstruct or furnish copies of the two (2) additional special Requests For Jury Instructions or to find the originals thereof, this order does not apply to those two (2) Requests."

prints even of the same words used in the crime does not violate the constitutional privilege against self-incrimination. Accord, *United States* v. *Rogers*, 475 F.2d 821, 825-826 (7th Cir. 1973). Moreover, compelling a voiceprint is neither a "search" nor a "seizure." *Dionisio*, 410 U.S. at 14-15. We reject Mitchell's attempt to limit *Dionisio* to the grand jury context in that, so long as the underlying seizure of the person is proper, requiring that person to submit voice exemplars violates no constitutional right. See *United States* v. *Rogers*, 475 F.2d 821 (7th Cir. 1973) (court-ordered submission); *United States* v. *Sanders*, 477 F.2d 112 (5th Cir.), *cert. denied*, 414 U.S. 870 (1973) (legally in custody on another matter). We also reject Mitchell's claim that the order requiring the voice exemplars, almost seven months subsequent to his arrest, came too late. See *United States* v. *Lincoln*, 494 F.2d 833 (9th Cir. 1974) (compulsion of handwriting exemplar less than one week prior to scheduled beginning of trial).

Britton and Mitchell also complain that voiceprint ("spectographic") analysis is too inaccurate to be admitted into evidence. Though the only circuit ruling on the admissibility of voiceprints has found them inadmissible, *United States* v. *Addison*, 498 F.2d 741 (D.C. Cir. 1974), *aff'g* 337 F. Supp. 641 (D.D.C. 1972), other courts are somewhat divided over, but the trend favors, the admissibility of voiceprints.[10] Although we, of course, are aware of the differences of judicial and scientific opinion concerning the use of voiceprints, we also

[10] Trial courts in "approximately 20 jurisdictions throughout the United States" have admitted voiceprints. *People* v. *Chapter*, 13 Crim. L. Rep. 2479 (Marin Cty. Cal. Super. Ct. July 23, 1973). Reported appellate decisions in Florida have admitted voiceprints. *Alea* v. *State* 265 So.2d 96 (3rd Fla. Ct. App. 1972); *Worley* v. *State*, 263 So.2d 613 (4th Fla. Ct. App. 1972). So has the United States Court of Military Appeals. *United States* v. *Wright*, 17 U.S.M.C.A. 183, 37 C.M.R. 447 (1967). New Jersey, which earlier held such analysis inadmissible, *State* v. *Cary*, 49 N.J. 343, 230 A.2d 384 (1967), has indicated the growing acceptance of such analysis. *State* v. *Andretta*, 61 N.J. 544, 296 A.2d 644 (1972). See also *United States* v. *Askins*, 351 F.Supp. 408, 416-418 (D. Md. 1972). California's courts of appeals are divided even among themselves. Compare *Hodo* v. *Superior Court*, 30 Cal. App.3rd 778, 106 Cal. Rptr. 547 (4th Ct. App. 1973), with *People* v. *Law*, 40 Cal. App.3rd 69, 114 Cal. Rptr. 708 (5th Ct. App. 1974). In

are mindful of "a considerable area of discretion on the part of the trial judge in admitting or refusing to admit" evidence based on scientific processes. *United States* v. *Stifel*, 433 F.2d 431, 437 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971).

> "[N]either newness nor lack of absolute certainty in a test suffices to render it inadmissible in court. Every useful new development must have its first day in court. And court records are full of the conflicting opinions of doctors, engineers and accountants . . . ." 433 F.2d at 438.

Moreover, *Stifel* recognized that those opposing the admissibility of scientific tests can direct their criticisms toward the weight of such evidence.[11] Applying *Stifel*, which admitted expert testimony concerning neutron activation analysis, we find that the district court was within its discretion in admitting voiceprint analysis. The district court qualified the expert voiceprint witness only after an extensive 25-page inquiry into his qualifications and the reliability of the scientific process; defense counsel were permitted to cross-examine the witness concerning his purported role as an advocate of the process and some other courts' refusals to admit voiceprint evidence. Moreover, neither Britton nor Mitchell produced a witness rebutting the government's claim that voiceprint analysis is sufficiently accurate to be admissible.[12]

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judicial proceedings other than criminal trials, Minnesota has admitted voiceprints to establish probable cause, *State ex rel. Trimble* v. *Hedman*, 241 Minn. 442, 192 N.W.2d 432 (1971), and a federal district court has admitted them at a parole revocation hearing. *United States* v. *Sample*, 378 F. Supp. 43 (E.D. Pa. 1974). See generally Annot., Admissibility and Weight of Voiceprint or Sound Spectograph Evidence, 49 A.L.R.3rd 915 (1973).

[11] Of course, appellants aired their criticism of voiceprints in cross-examining the voiceprint expert. The district judge, moreover, specifically instructed the jury that Mitchell's refusal to submit voice exemplars may stem from a "lack of trust in the validity of the voice exemplar test." Trial Transcript at 3683.

[12] *United States* v. *Sample*, 378 F. Supp. 43, 53 (E.D. Pa. 1974); *United States* v. *Brown*, 13 Crim. L. Rep. 2203, 2204 (D.C. Super.

We also reject Britton's claim that the expert improperly testified to what he heard on the tapes as well as to identifying voices. After all, the district judge cautioned that "it [was] for the jury to weigh the expert's testimony [as to what was said]." Trial Transcript at 109. Moreover, the jury listened to the tapes. Even transcripts of taped conversations have been admitted. See *Fountain* v. *United States*, 384 F.2d 624 (5th Cir. 1967), *cert. denied sub. nom., Marshall* v. *United States*, 390 U.S. 1005 (1968); see also *United States* v. *Desist*, 384 F.2d 889, 899 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969).

Franks claims that the district judge erred in admitting into evidence certain admittedly falsified documents implicating him in the bombings in question and in another bombing. We find, however, no prejudicial error in that the trial judge twice cautioned the jury that such documents were not being offered for their truth and were written to protect the government's informant.[13] Of course, the knowing use of false evi-

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Ct. May 1, 1973); cf. *People* v. *Chapter*, 13 Crim. L. Rep. 2479 (Marin Cty. Cal. Super. Ct. July 23, 1973). Though *United States* v. *Stifel*, 433 F.2d 431, 438, 441 (6th Cir. 1970), *cert. denied*, 401 U.S. 994 (1971), applied the *Frye* v. *United States*, 293 F. 1013 (1923), standard governing admissibility of scientific evidence as whether the scientific process has gained "general acceptance in the particular field in which it belongs," we deem general acceptance as being nearly synonymous with reliability. If a scientific process is reliable, or sufficiently accurate, courts may also deem it "generally accepted." Accord, *United States* v. *Brown*, 13 Crim. L. Rep. 2203, 2204 (D.C. Super. Ct. May 1, 1973).

[13] "[THE COURT: I]nsofar as the contents of the memoranda is concerned, it is my understanding, as I said, that the Government does not contend that that's factually correct, and it is not being offered for the truth of the contents of the memoranda, but simply as setting up a ruse or protection for the informer, Davis. Now, you jurors understand that, do you not?

"(Jury indicates affirmatively.)

"THE COURT: You won't take anything in those memoranda as being an assertion as being true as evidence in the case? I am sure you won't.

"Now, is there anything else that we need to say to protect everybody here?

"MR. PAUL [Britton's counsel]: I think that's fair enough." Trial Transcript at 478-479.

When the documents were referred to later, the district judge again cautioned the jury:

". . . I don't believe it is necessary, but I will remind you

dence if uncorrected violates due process. *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959). But juries are expected to follow their instructions. *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967). Even where false evidence has been "corrected" by subsequent defense cross-examination, rather than by the government *ab initio*, courts have found no prejudicial error. *Link* v. *United States*, 352 F.2d 207, 210-211 (8th Cir. 1965), *cert. denied*, 383 U.S. 915 (1966); see *United States* v. *Marchese*, 341 F.2d 782, 795-801 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965). See generally *Manning* v. *Rose*, No. 74-1121 fn. 2 (6th Cir., filed Dec. 13, 1974).

Mitchell claims that the district judge erred in admitting into evidence a photograph comparing, apparently side-by-side, three different blasting caps where the photograph "attempted to take the decision away from the jury of determining whether or not the caps had a similarity" and where "[t]he caps were present for jury examination." Of course, the admission of photographs lies within the district judge's discretion. *United States* v. *Burton*, 485 F.2d 715, 717-718 (8th Cir. 1973); *United States* v. *White*, 454 F.2d 435, 438 (7th Cir. 1971), *cert. denied*, 406 U.S. 962 (1972). We find no abuse of discretion particularly in light of the non-inflammatory nature of the photographs and in light of established case law that photographs may supplement other evidence. See *St. Lukes Hosp. Ass'n* v. *Long*, 125 Colo. 25, 240 P.2d 917, 922 (1952); *Morrissey* v. *Connecticut Valley St. Ry.*, 233 Mass. 554, 124 N.E. 435, 437 (1919).

Mitchell also claims that the district judge erred in instructing the mens rea requirement of a section 842(a)(3)(A) vio-

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again that the contents of these documents, that is the information in there is not being offered by the Government as being truthful. It is simply the Government, as you remember, according to the Government, used these documents through Mr. Davis to convince other people that some things were going on that really weren't. You recall that, I am sure."

Trial Transcript at 2504. By twice, and particularly by promptly, admonishing the jury, the district judge substantially reduced the risk of prejudice. See *Manning* v. *Rose*, No. 74-1121 fn. 2 (6th Cir., filed Dec. 13, 1974).

lation.[14] Mitchell argues that the jury must find that the transporter knew that the interstate transportation violated federal law. By the statute's plain language, however, the violator must "knowingly" transport explosives in interstate commerce; there is no requirement that the violator know that such transportation violates federal statute. Had Congress intended such a requirement, it could easily have imposed one. The judicial imposition of such a requirement would be particularly inappropriate in light of the almost universal lack of such requirement, LaFave & Scott, Criminal Law § 47 (1972), and of Congress' remedial purpose in enacting section 842. See *United States* v. *Dawson*, 467 F.2d 668, 671-673 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973); 116 Cong. Rec. 35298-35261 (1970).

Likewise we reject Mitchell's assertion that there was insufficient evidence that he "caused" the interstate transportation of explosive devices. "Cause," of course, has a broad meaning. See *United States* v. *Hill*, 468 F.2d 899 (5th Cir. 1972); *United States* v. *Boone*, 460 F.2d 1285 (4th Cir. 1972). As long as one puts in motion forces resulting in the interstate transportation of explosive devices, he has "caused" their interstate transportation; surely, one "causes" such interstate

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[14] "[I]n order to find the defendant Mitchell guilty under Count III of the indictment, you must find that on or about June 1, 1971, the defendant Mitchell knowingly caused to be transported from the Northern District of Mississippi into the Western District of Tennessee, Western Division, explosive materials, to-wit, non-electric blasting caps . . . .

"Now, members of the jury, I charge you that it is not necessary that it be shown that the defendant Mitchell had knowledge at that time that it was a violation of the Federal Criminal Law to cause to be transported blasting caps in interstate commerce. It is necessary, however, that it be shown that at that time the defendant Mitchell knowingly caused such caps to be transported from the Northern District of Mississippi into the Western District of Tennessee, Western Division.

"Members of the jury, an act is done knowingly if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason . . . ." Trial Transcript at 3664-3665.

transportation by giving such devices to one he knows will cross state lines.[15]

We also reject Mitchell's claim that the district court lacked juridsiction because "every act necessary on the part of the defendant, Mitchell, in order to be convicted" occurred outside the district. Federal statute specifically provides that

> "[a]ny offense involving the . . . transportation in interstate or foreign commerce is a continuing offense and, except as otherwise expressly provided . . ., may be inquired of and prosecuted in any district from, through, or into which such commerce . . . moves." 18 U.S.C. § 3237 (1970).

Clearly the district court had jurisdiction over the charge that Mitchell unlawfully caused the blasting caps to be transported from Mississippi to Memphis, Tennessee. *Lord* v. *United States,* 412 F.2d 499 (4th Cir. 1969); *Oliver* v. *United States,* 299 F.2d 352 (8th Cir.), *cert. denied,* 370 U.S. 960 (1962); *United States* v. *Malfi,* 264 F.2d 147 (3rd Cir.), *cert. denied,* 361 U.S. 817 (1959).

Mitchell claims error in admitting evidence that he was held in contempt for refusing to give a court-ordered exemplar and in instructing the jury that it could infer consciousness of guilt from such refusal.[16] There was no evidence before the

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[15] The district judge instructed the jury that

> "if you find that the defendant Mitchell turned over blasting caps to Webster with knowledge that Webster intended forthwith to transport such blasting caps from the State of Mississippi to the Western District of Tennessee, Western Division, and that the caps were forthwith so transported, then you may find that defendant Mitchell knowingly caused the blasting caps to be transported in interstate commerce as charged in the . . . indictment."

Trial Transcript at 3665-3666.

[16] "Members of the jury, as you know, there has been evidence in this case to the effect that the defendant Mitchell refused to give his voice exemplar for the purpose of making a comparison between his known voice characteristics and the voice contained on certain tapes obtained by the Government . . . . I charge you that such conduct on the part of a defendant, if you find that the defendant Mitchell did refuse to give his voice exemplar . . . is not of course

jury that Mitchell was cited for contempt. Trial Transcript at 2223-2227, 3424-3425. Evidence that Mitchell refused to comply with the court order, of course, is admissible. See *United States* v. *Nix*, 465 F.2d 90, 93 (5th Cir.), *cert. denied*, 409 U.S. 1013 (1972); *Higgins* v. *Wainwright*, 424 F.2d 177 (5th Cir.), *cert. denied*, 400 U.S. 905 (1970); *United States* v. *Parhms*, 424 F.2d 152 (9th Cir.), *cert. denied*, 400 U.S. 846 (1970); see also *United States* v. *Stembridge*, 477 F.2d 874 (5th Cir. 1973).

Mitchell claims error in the admission of evidence of six other crimes, particularly evidence that he attempted to conspire to kill a government witness. Evidence of such attempted conspiracy, with proper cautionary instructions,[17] is admissible as showing "consciousness of guilt." *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); *United States* v. *Alberti*, 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973). Evidence of the later interstate transportation of explosives (blasting caps) was proper as showing "scheme or plan, motive, knowledge, intent, absence of mistake or accident, [or] identity." *Manning* v. *Rose*,

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sufficient in itself to establish his guilt. But [it is a fact] which, if proved, may be considered by the jury in the light of all the other evidence, in the case in determining guilt or innocence. Whether or not evidence of such conduct shows a consciousness of guilt and the significance to be attached to any such evidence are matters exclusively within the province of the jury. In your consideration of this evidence, you should consider there may be reasons for this which are fully consistent with innocence. There may include lack of trust in the validity of the voice exemplar test. Let me also suggest to you that feeling of guilt does not necessarily reflect actual guilt. The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence." Trial Transcript at 3683-3684.

[17] "I charge you that such conduct on the part of a defendant, if you find that the defendant Mitchell . . . did take some action for the purpose of doing away with said witness, after he was accused of this crime, is not of course sufficient in itself to establish his guilt. But [it is a fact] which, if proved, may be considered by the jury in the light of all the other evidence in the case in determining guilt or innocence. Whether or not evidence of such conduct shows a consciousness of guilt and the significance to be attached to any such evidence are matters exclusively within the province of the jury . . . . Let me also suggest to you that feeling of guilt does not necessarily reflect actual guilt." Trial Transcript at 3682-3683.

No. 74-1121 (6th Cir., filed Dec. 13, 1974). Although the district judge should have cautioned the jury concerning the limited purpose of such evidence, *Manning, supra,* fn. 2, we decline to find plain error in the district judge's failure to so instruct. *United States* v. *Salter,* 346 F.2d 509, 512 (6th Cir. 1965), *cert. denied,* 383 U.S. 943 (1966); see *United States* v. *Minyard,* 461 F.2d 931, 933-934 (9th Cir. 1972); *United States* v. *Johnson,* 415 F.2d 655-656 (9th Cir. 1969), *cert. denied,* 396 U.S. 1019 (1970); *Baker* v. *United States,* 310 F.2d 924 (9th Cir. 1962), *cert. denied,* 372 U.S. 954 (1963). Such transportation, being malum prohibitum, would be unlikely to inflame the jury. Moreover, although Mitchell's counsel objected to several aspects of the jury instructions, he apparently was satisfied with the lack of a cautionary instruction.

Mitchell claims that the one-year delay between his arrest and his trial violated his constitutional right to a speedy trial. In balancing the four factors enunciated in *Barker* v. *Wingo,* 407 U.S. 514 (1972), particularly in light of *Trigg* v. *State,* No. 74-1515 (6th Cir., filed Dec. 11, 1974), we find no denial of such right. First, the 28-volume transcript, compiled over sixteen trial days, indicates that the trial involved complex charges rather than charges of "an ordinary street crime." See *Barker, supra,* at 531. Moreover, the length of the pre-trial delay was considerably less than the delay of more than two years prior to the trial of the "ordinary street crime" in *Trigg.* Second, at least part of the delay can be attributed to Mitchell's pretrial maneuvering and, in particular, to his refusal to comply with the court order requiring him to submit a voice exemplar. Third, although the courts have rejected the doctrine of requiring the assertion of the right to a speedy trial, asserting such a right remains relevant. *Barker, supra,* at 524-529. The government has argued that at no time prior to his trial did Mitchell assert such right; Mitchell, in arguing that the demand doctrine has been rejected, apparently accepts the government's factual claim. Fourth, Mitchell has made no showing whatsoever that the delays impaired his defense.

The claim that the district judge should have recused himself from trying Mitchell is untenable. First, there is no showing that Mitchell's attorney of record certified the good faith of Mitchell's affidavit claiming bias and prejudice. *United States* v. *Thomas*, 299 F. Supp. 494, 500 (E.D. Mo. 1968). Second, even assuming procedural compliance with 28 U.S.C. § 144 (1970), Mitchell's allegations that the district judge had cited him for contempt at best demonstrate judicial, as opposed to personal, bias. *Oliver* v. *Michigan State Bd. of Educ.*, Nos. 74-1104 & 74-1105 (6th Cir., filed Dec. 9, 1974); *United States* v. *Roca-Alvarez*, 451 F.2d 843, 848 (5th Cir. 1971); *Hanger* v. *United States*, 398 F.2d 91, 100-101 (8th Cir. 1968), *cert. denied*, 393 U.S. 1119 (1969); *United States* v. *Garrison*, 340 F. Supp. 952, 956-957 (E.D.La. 1972). Third, much of Mitchell's affidavit contains "scurrilities and generalities [which] fall far short of the specificities required by statute." *Griffith* v. *Edwards*, 493 F.2d 495, 496 (8th Cir. 1974); *Martelli* v. *City of Sonoma*, 359 F. Supp. 397, 400 (N.D. Cal. 1973).

Mitchell also contends, without making any specific claim of prejudice, that the district judge erred in excusing a juror midway through the trial with "no more than a cursory examination" into the juror's illness and that a district court standing order[18] prohibiting the unauthorized post-verdict questioning of jurors violates his constitutional right to a trial by jury. The

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[18] "It appearing to the Judges of this Court that the post-verdict interrogation of jurors in furtherance of a fishing expedition in an effort to find material to impeach the verdict by testimony of a juror should be prohibited;

"It is, therefore, ordered that no attorney, party or representative of either may interrogate a juror after the verdict has been returned without prior approval of the Court. Approval of the Court shall be sought only by an application made by counsel orally in open court or upon written motion which states the grounds and the purpose of the interrogation.

"It is further ordered that if a post-verdict interrogation of one or more members of the jury should be approved, the scope of the interrogation and other appropriate limitations upon the interrogation may be prescribed at the time that the approval is granted by the presiding judge." Accord, N.J. Rev. Rule 1:25(a) (——).

record[19] conclusively demonstrates that the district judge properly excused the juror. See Fed.R.Crim.P. 24(c); *United States* v. *Cameron*, 464 F.2d 333 (3rd Cir. 1972); *United States* v. *Garafolo*, 385 F.2d 200, 207-08 (7th Cir. 1967), *vacated and remanded on other grounds*, 390 U.S. 144 (1968); *United States* v. *Ellenbogen*, 365 F.2d 982, 989 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967). Moreover, it is well established that trial judges exercise their discretion in permitting the post-verdict interrogation of jurors. *United States* v. *Stacey*, 475 F.2d 1119 (9th Cir. 1973); *Miller* v. *United States*, 403 F.2d 77 (2d Cir.), *dismissing appeal from* 284 F. Supp. 220 (D. Conn. 1968); *United States* v. *Driscoll*, 276 F. Supp. 333, 336-39 (S.D.N.Y. 1967), *rev'd on other grounds*, 399 F.2d 135 (2nd Cir. 1968). But see *Parker* v. *Gladden*, 385 U.S. 363 (1966).

Though Mitchell has claimed other reversible error, we have found those claims to be similarly lacking in merit.

Affirmed.

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[19] "THE COURT: The sergeant indicates that one of the jurors has a problem.
"Is it you, ma'am?
"THE JUROR: Yes, sir.
"THE COURT: What is it?
"THE JUROR: I guess it is my nerves. My head is dizzy, and I am nauseated.
"THE COURT: Will you gentlemen approach the bench a minute? . . .
"THE COURT: Do you want to excuse her?
"[MITCHELL'S ATTORNEY]: No, sir, I don't . . .
"THE COURT: Let me ask you this, ma'am: Do you think your physical condition is such that it is going to make it difficult for you to continue to listen to these witnesses and follow the proof?
"THE JUROR: Yes, sir, I think so . . . .
"THE COURT: I will say that she doesn't look well to me . . . . I will go ahead and excuse her.
"[MITCHELL'S ATTORNEY]: I want to note my exception to that.
"THE COURT: All right."
Trial Transcript at 1610-1613.

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statement	3
Argument	5
Conclusion	15

CITATIONS

Cases:

Barker v. *Wingo*, 407 U.S. 514	12
Barnes v. *United States*, 412 U.S. 837	8
Gottesman, Application of, 332 F. 2d 975	9
Int'l Ladies' Garment Workers' Union v. *National Labor Relations Board (Bernhard-Altmann)*, 366 U.S. 731	7-8
Massiah v. *United States*, 377 U.S. 201	5
National Labor Relations Board v. *Local 210 Teamsters*, 330 F. 2d 46	8
Osborn v. *United States*, 385 U.S. 323	7
Ottomano v. *United States*, 468 F. 2d 269, certiorari denied, 409 U.S. 1128	10
Powell v. *Texas*, 392 U.S. 514	6
Retail Clerks Local 1625 v. *Schermerhorn*, 373 U.S. 746, 375 U.S. 96	8
United States v. *Addison*, 498 F. 2d 741	6
United States v. *Bayer*, 331 U.S. 532	12
United States v. *Bell*, 457 F. 2d 1231	9
United States v. *Binder*, 453 F. 2d 805, certiorari denied, 407 U.S. 920	10
United States v. *Desist*, 384 F. 2d 889, affirmed, 394 U.S. 244	7

Cases—Continued	Page
United States v. *Dionisio*, 410 U.S. 1	6
United States v. *Dowdy*, 479 F. 2d 213, certiorari denied, 414 U.S. 823	5
United States v. *Enmons*, 410 U.S. 396	7
United States v. *Gimelstob*, 475 F. 2d 157, certiorari denied, 414 U.S. 828	9
United States v. *Mendell*, 447 F. 2d 639, certiorari denied, 404 U.S. 991	10
United States v. *Perna*, 491 F. 2d 253	10
United States v. *Silva*, 449 F. 2d 145, certiorari denied, 405 U.S. 918	5
United States v. *Snyder*, 505 F. 2d 595, certiorari denied, March 24, 1975 (No. 74-5820)	10
United States v. *White*, 401 U.S. 745	5
Constitution and statutes:	
U. S. Constitution:	
Fourth Amendment	5
Fifth Amendment	6
Hobbs Act, 18 U.S.C. 1951	7
National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*	
Section 7, 29 U.S.C. 157	7
Section 8(a)(1), 29 U.S.C. 158(a)(1)	7
18 U.S.C. 2	3
18 U.S.C. 842	9
18 U.S.C. 842(a)(3)(A)	3-4, 13
18 U.S.C. 844	8
18 U.S.C. 844(i)	3, 8

Constitution and statutes—Continued Page

18 U.S.C. 1951 ..... 3, 7
18 U.S.C. 3237 13
28 U.S.C. 144 13
Tenn. Code Ann. §§ 50-208 to 50-210 8

Miscellaneous:

Annotation, *Admissibility and Weight of Voiceprint or Sound Spectograph Evidence*, 49 A.L.R.3d 915 6

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1281

HERMAN FRANKS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6191

MAX BRITTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-6318

BOYCE MITCHELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 74-1281, App. 5a-24a) is reported at 511 F. 2d 25.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1975. The petition for a writ of certiorari in No. 74-1281 was filed on April 11, 1975, and is therefore out of time under Rule 22(2) of the Rules of this Court. The petition for a writ of certiorari in No. 74-6318 was filed on April 8, 1975, and is therefore also out of time under Rule 22(2) of the Rules of this Court. The petition for a writ of certiorari in No. 74-6191 was timely filed on March 14, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether tapes of conversations between various persons and an informant, made with the latter's consent, were properly admitted into evidence (raised by all petitioners).

2. Whether voice prints and expert testimony relating thereto and to the contents of the tapes were properly admitted in evidence (raised by petitioners Britton and Mitchell).

3. Whether planning to bomb places of business in part for a private purpose and in part to bring about unionization of employees therein constitutes

a violation of the Hobbs Act (raised by Franks and Britton).

4. Whether the trial court abused its discretion in denying motions for severance (raised by all petitioners).

5. Whether petitioner Franks was prejudiced by the introduction in evidence of false documents compiled to protect a government informer.

6. Whether the co-conspirator exception to the hearsay rule is applicable where the indictment does not charge a conspiracy (raised by Britton).

7. Whether petitioner Britton was entitled to a new trial because of the loss, apparently by court attendants, of two proposed jury instructions which the court rejected.

8. Whether petitioner Mitchell was denied a speedy trial, and whether reversal of his conviction is required by certain other alleged errors.

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioners Franks and Britton were convicted of (a) causing physical violence to two business establishments whose operations affected commerce, in furtherance of a plan to obstruct commerce, in violation of 18 U.S.C. 1951 and 18 U.S.C. 2, (b) aiding and abetting an attempt to destroy the two places of business by means of an explosive, in violation of 18 U.S.C. 844(i) and 18 U.S.C. 2, and (c) interstate transportation of blasting caps, in violation of 18

U.S.C. 842(a)(3)(A). Petitioner Mitchell was convicted of the interstate transportation of blasting caps in violation of 18 U.S.C. 842(a)(3)(A). Franks and Britton received concurrent sentences of ten years' imprisonment on each count. Mitchell was sentenced to imprisonment for eight years. The court of appeals affirmed in a lengthy opinion (Pet. App. 5a-24a).[1]

Since none of the petitioners challenge the sufficiency of the evidence, a detailed recitation of the facts involved is unnecessary.[2] Briefly, the evidence established that petitioners Franks and Britton, who were active members of the Journeymen Barbers International Union in Memphis, Tennessee, caused places of business operated by Charles Holland to be damaged by means of an explosive device.

The bombing of Holland's establishments occurred after Franks and Britton had unsuccessfully attempted to persuade him to operate a union shop and to charge higher rates of tuition at his barber college. Franks arranged for the purchase of dynamite, fuses, and blasting caps and Britton agreed to pay $5,000 to three persons for the bombing of two of Holland's places of business.

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[1] Each of the petitions for certiorari has appended thereto a copy of the court of appeals opinion, the paginations differing. References herein are to the appendix of the Franks petition, designated as "Pet. App.".

[2] A detailed discussion of the evidence is set forth in the government's brief in the court of appeals. A copy of that portion of the brief is being lodged with the Clerk of this Court.

Petitioner Mitchell operated a restaurant in Tunica, Mississippi, and he caused blasting caps used in the bombing to be transported across state lines to Memphis, Tennessee.

ARGUMENT

1. During the investigation, Davis, one of the participants in the bombing, acted as a paid government informant whose conversations with other participants were electronically transmitted to a government vehicle, where they were recorded (Britton Pet. 5).

The contention that recordings of the conversations were admitted in violation of the Fourth Amendment is foreclosed by *United States* v. *White*, 401 U.S. 745, which held that the Fourth Amendment is not violated where one party to the conversation consents to the recording.[3]

Petitioner Mitchell urges, without citation of authority, that Davis' consent to the electronic transmission was "non-existent" because induced by promises of leniency. But consent is not involuntary because it is motivated by personal advantage. See, *e.g.*, *United States* v. *Dowdy*, 479 F. 2d 213, 229 (C.A. 4), certiorari denied, 414 U.S. 823; *United States* v. *Silva*, 449 F. 2d 145 (C.A. 1), certiorari denied, 405 U.S. 918.

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[3] Petitioners' reliance on *Massiah* v. *United States*, 377 U.S. 201, is misplaced. In *Massiah* the electronic transmission occurred after the defendant had been indicted, in violation of his right to counsel under the Sixth Amendment. No such situation is presented here.

2. Petitioners Britton and Mitchell claim that the trial court erred in admitting their voice exemplars in evidence (Britton Pet. 11; Mitchell Pet. 11). This claim is based on the contention that voice exemplars have not been accepted as a reliable identification technique by the scientific community.

While *United States* v. *Addison*, 498 F. 2d 741 (C.A.D.C.), cited by petitioners, held that admission of spectographic analysis of voice exemplars was error (although harmless in circumstances of the case), the court emphasized that it might reach a contrary result in future cases because of the growing acceptance of the technique by the scientific community. Here the court of appeals surveyed the case law concerning this question and found that the trend favored admission of voice prints or exemplars (Pet. App. 15a-16a; see also 49 A.L.R. 3d 915-924).

There is no occasion for review of this evidentiary question by this Court. The admissibility of voice exemplars presents no issue of constitutional magnitude and it is the kind of issue that is properly left to development in the courts of appeals. Cf. *Powell* v. *Texas*, 392 U.S. 514.[4]

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[4] Petitioner Britton's contention (Britton Pet. 8) that the exemplars were admitted not only for identification but also for evidence is incorrect. The exemplars were used solely for identification (Tr. 2223, 2228). To the extent petitioners contend that the order compelling them to give voice prints violated their Fifth Amendment privilege against self-incrimination, it is foreclosed by *United States* v. *Dionisio*, 410 U.S. 1.

Recordings of conversations between petitioners and a government informant were, as shown above, properly ad-

3. Petitioners Franks and Britton, relying on *United States* v. *Enmons*, 410 U.S. 396, contend that since the bombings involved here occurred pursuant to a legitimate union objective—the unionization of the bombed establishments—the Hobbs Act, 18 U.S.C. 1951, is inapplicable. Unlike *Enmons*, which involved violence directed at securing higher wages under an existing collective bargaining relationship, here petitioners sought to compel Holland, the owner of the bombed establishments, to require his employees to join the union.

This was not a legitimate union objective. The union could, of course, have attempted to organize Holland's employees and sought recognition upon a proper showing that a majority of employees desired to be represented by it. But in the absence of such a showing, Holland's recognition of the union would have constituted an interference with his employees' rights, protected by Section 7 of the National Labor Relations Act, as amended, 29 U.S.C. 157, and would have been an unfair labor practice under Section 8 (a)(1) of the Act, 29 U.S.C. 158(a)(1).[5] *Int'l*

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mitted. Petitioners' claim that the district court erred in permitting the government's expert to interpret portions of the recordings is insubstantial. See *United States* v. *Desist*, 384 F. 2d 889, 899 (C.A. 2), affirmed, 394 U.S. 244; cf. *Osborn* v. *United States*, 385 U.S. 323, 333-340.

[5] Moreover, to the extent petitioners sought to compel Holland to agree to either a closed shop, *i.e.*, union membership as a prerequisite to employment, or a so-called "union shop", *i.e.*, union membership required within a stated period from employment, such objectives violated the Tennessee

Ladies' Garment Workers' Union v. *National Labor Relations Board (Bernhard-Altmann)*, 366 U.S. 731, 737-738. Union insistence on such conduct would have also constituted an unfair labor practice. *Bernhard-Altmann, supra; National Labor Relations Board* v. *Local 210 Teamsters*, 330 F. 2d 46, 47 (C.A. 2).

Moreover, the bombings were not motivated solely by union objectives. Petitioner Franks operated a competing business and he had stated that Holland was going to ruin the barber business in Memphis by charging cut-rate prices (Tr. 1107-1108, 1211-1213, 930-933, 938-939).

In any event, there is no need for this Court to consider this issue since petitioners received identical concurrent sentences on the Hobbs Act violation and the violation of 18 U.S.C. 844(i) involving the damaging of property through an explosive device. *Barnes* v. *United States*, 412 U.S. 837, 848 n. 16.

4. Petitioners' various claims concerning joinder and severance were properly rejected by the court of appeals (Pet. App. 7a-11a), on whose opinion in this regard we basically rely. The Hobbs Act charges were properly joined with the charges under 18 U.S.C. 844 since they related to the same transaction—the bombing of Holland's places of business on June 2, 1971.

Petitioner Mitchell's claim that he should have been granted a severance because he was prejudiced by the

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"right to work" laws. See Tenn. Code Ann. §§ 50-208 to 50-210. See generally *Retail Clerks Local 1625* v. *Schermerhorn*, 373 U.S. 746, 375 U.S. 96.

introduction of evidence concerning the bombing is insubstantial. Mitchell was charged only with violation of 18 U.S.C. 842 (interstate transportation of blasting caps), but had this charge been tried separately, evidence concerning the bombings would have been admissible to show intent. See, *e.g.*, *United States* v. *Gimelstob*, 475 F. 2d 157, 160 (C.A. 3), certiorari denied, 414 U.S. 828. Thus, he was not prejudiced by being tried jointly with Franks and Britton.

Petitioners Franks and Britton contend that the trial court erred in refusing to sever their trials from that of Mitchell because they were prejudiced by the introduction of evidence that Mitchell conspired to kill a government witness. But, as the court of appeals held (Pet. App. 10a), there was no prejudice since the "jury could be expected to segregate such evidence and apply it only to Mitchell." See, *e.g.*, *United States* v. *Bell*, 457 F. 2d 1231, 1240 (C.A. 5); *Application of Gottesman*, 332 F. 2d 975 (C.A. 2); *United States* v. *Gimelstob*, *supra*.

5. Petitioner Franks' contention that he was prejudiced by the admission of false documents indicating that he had participated in another bombing of a barbershop is insubstantial (Franks Pet. 7). This contention arises from the following facts: During the investigation of the bombings, government agents became concerned that Davis' cooperation would become known or suspected. Accordingly, a plan to shift suspicion from Davis was devised. Reports containing some false information purportedly furnished

by someone other than Davis, typed on government forms, were furnished Davis and shown by him to petitioners. The false reports were admitted into evidence as a foundation for Davis' testimony concerning the reaction of petitioners when they were shown the reports (Tr. 461, 474-476, 480-485, 496-498, 561-562, 590-592).

The circumstances surrounding the reports were explained to the jury, which was twice instructed that the reports were not admitted for the truth of the matters contained therein (Tr. 478-479, 2504). The court of appeals correctly held (Pet. App. 17a-18a) that, in the circumstances of this case, the admission of the documents was not prejudicial.

6. Petitioner Britton's contention (Britton Pet. 10-11) regarding hearsay evidence is unclear. To the extent he argues that the existence of a conspiracy charge is necessary to sustain the admission of hearsay, his claim is erroneous since such evidence is admissible so long as there is independent evidence that petitioners were part of a joint venture in crime. *United States* v. *Snyder*, 505 F. 2d 595 (C.A. 5), certiorari denied, March 24, 1975 (No. 74-5820); *United States* v. *Perna*, 491 F. 2d 253, 255 (C.A. 6); *Ottomano* v. *United States*, 468 F. 2d 269, 273 (C.A. 1), certiorari denied, 409 U.S. 1128; *United States* v. *Binder*, 453 F. 2d 805, 809 (C.A. 2), certiorari denied, 407 U.S. 920; *United States* v. *Mendell*, 447 F. 2d 639, 642 (C.A. 7), certiorari denied, 404 U.S. 991.

The district court correctly instructed the jury that such evidence could be considered only if it found

that independent evidence established that petitioners were participants in a joint venture in crime (Tr. 3678-3682). This instruction was consistent with the standard that petitioner Britton advocates (Britton Pet. 10-11) and the evidence of his participation in a joint criminal venture was sufficient to permit the admissibility of declarations of co-venturers. See the statement portion of the government's court of appeals brief which has been lodged with the Clerk of this Court.

7. Britton's contention (Britton Pet. 11-12) that his conviction should be reversed because of the loss, apparently by court attendants, of two requested defense instructions that the court refused to give is baseless. Petitioner apparently did not retain a copy of his requested instructions and apparently he does not now recall the content of one of them (Britton Pet. 12). The trial court gave complete and accurate instructions concerning the elements of the offense, burden of proof, and credibility (Tr. 3656-3686). Absent a specific claim of prejudice, petitioner is not entitled to relief.

Petitioner suggests that the second instruction was that a party that calls a witness "vouche[s] for his honesty" (Britton Pet. 12). But even assuming that this was a proper instruction,[*] the trial court did not

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[*] In fact, petitioner's proffered instruction is a formulation of the rule that prohibits a party from impeaching his own witness. It is doubtful that it is a proper jury instruction because, for example, it invites the jury to convict if it finds that a defense witness has committed perjury.

abuse its discretion in rejecting it in favor of the more common standard instructions on credibility (see Tr. 3674-3675, 3684-3685). See *United States* v. *Bayer*, 331 U.S. 532, 536.

8. Mitchell's additional contentions are without merit.

a. Mitchell argues that he was denied his right to a speedy trial (Mitchell Pet. 21-24). Mitchell was indicted and arrested on March 13, 1972, and brought to trial on March 19, 1973. On July 21, 1972, a hearing was held on pre-trial motions that had been filed and the court granted Mitchell's request for the production of transcripts of all conversations recorded by use of electronic surveillance. The transcripts were completed and produced on August 11, 1972.

On September 19, 1972, the government's motion for voice exemplars was granted. Mitchell's appeal from this order was argued on December 18, 1972, and decided adversely to him four days later. Mitchell then refused to comply with the court's order, and was held in civil contempt. His attempted appeal therefrom was dismissed by the court of appeals (Mitchell Pet. 21-22).

The delay in beginning the trial was due to Mitchell's discovery requests and to his efforts to avoid the order compelling production of exemplars. Moreover, Mitchell did not raise the speedy trial claim until the first day of trial (Tr. 15-16), and he has never alleged, and does not now allege, any specific prejudice. Under the principles of *Barker* v. *Wingo*, 407 U.S. 514, there was no denial of a speedy trial.

b. There is no substance to Mitchell's contention (Mitchell Pet. 24-25) that the trial judge should have disqualified himself because he had previously held Mitchell in civil contempt for his refusal to give exemplars. This contention was properly rejected by the court of appeals, on whose opinion in this regard we rely. As the court held (Pet. App. 23a), "there is no showing that Mitchell's attorney of record certified the good faith of Mitchell's affidavit claiming bias and prejudice" as required by 28 U.S.C. 144; and much of the affidavit contains " 'scurrilities and generalities [which] fall far short of the specificities required by statute.' "

c. Venue of the offense, contrary to Mitchell's contention (Mitchell Pet. 28-29), is established by 18 U.S.C. 3237, which provides that transportation in interstate or foreign commerce is a continuing offense that may be prosecuted in any district through which such commerce moves.

d. Mitchell urges reversal of his conviction because a standing order of the district court prohibited questioning of the jurors after verdict without the permission of the trial court (Mitchell Pet. 38). But, as the court of appeals correctly held (Pet. App. 23a), post-verdict interrogation of jurors is subject to the discretionary control of the court. Petitioner has shown no abuse of that discretion.

e. Mitchell's contentions regarding the constitutionality of 18 U.S.C. 842(a)(3)(A) (Mitchell Pet. 25-28) were correctly rejected by the opinion below, on which we rely (Pet. App. 19a-20a):

Mitchell argues that the jury must find that the transporter knew that the interstate transportation violated federal law. By the statute's plain language, however, the violator must "knowingly" transport explosives in interstate commerce; there is no requirement that the violator know that such transportation violates federal statute. Had Congress intended such a requirement, it could easily have imposed one. The judicial imposition of such a requirement would be particularly inappropriate in light of the almost universal lack of such requirement, LaFave & Scott, Criminal Law § 47 (1972), and of Congress' remedial purpose in enacting section 842. See *United States* v. *Dawson*, 467 F.2d 668, 671-673 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973); 116 Cong. Rec. 35298-35361 (1970).

Likewise we reject Mitchell's assertion that there was insufficient evidence that he "caused" the interstate transportation of explosive devices. "Cause," of course, has a broad meaning. See *United States* v. *Hill*, 468 F.2d 899 (5th Cir. 1972); *United States* v. *Boone*, 460 F.2d 1285 (4th Cir. 1972). As long as one puts in motion forces resulting in the interstate transportation of explosive devices, he has "caused" their interstate transportation; surely, one "causes" such interstate transportation by giving such devices to one he knows will cross state lines. [Footnote omitted.]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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JUNE 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 578456 175